

**Achievement of Market-Friendly Initiatives and Results Program
(AMIR 2.0 Program)**

Funded By U.S. Agency for International Development

Legal Material Development on Franchising
(Introducing the Potential of Franchising Arrangement for MSEs)

Final Report

Deliverable for MEI Component, Task No 335.1.2
Contract No. 278-C-00-02-00201-00

December 2002

This report was prepared by International Business Legal Associates (IBLAW) in collaboration with Chemonics International Inc., prime contractor to the U.S. Agency for International Development for the AMIR Program in Jordan.

Table of Contents

	Page No.
Referenced Documents	3
Abbreviations	3
Glossary	4
1- Introduction	5
1.1 History & Overview	5
1.2 Definition & Brief Explanation about the Nature of Franchising	6
2- Franchising for Micro and Small Enterprises (MSEs)	7
3- Importance and Business Advantages of Franchising	9
3.1 Franchisor's Benefits	9
3.2 Franchisee's Benefits	10
4- Structures for Carrying Out Franchising	11
4.1 Unit Franchising	11
4.2 Area Franchising	11
4.2.1 Developer Agreement	12
4.2.2 Master Franchising	12
5- Type of Franchising	13
5.1 Manufacturing Franchise	13
5.2 Distributing Franchise	13
5.3 Business Format Franchise	13
6- Terms & Rules of the Franchise Agreement	13
6.1 Major Obligations of the Parties in the Franchise Agreement	14
6.1.1 The Obligation of the Franchisor	14
6.1.1.1 Efficient Licensing of Intellectual Property Rights Incorporated into the Franchised System	14
6.1.1.2 Transparent and Clear Communication and Transferral of the Franchised System	15
6.1.2 The Obligations of the Franchisee	15
6.1.2.1 Compliance with the Franchised System	15
6.1.2.2 Payment of Fees	15
6.2 Types of Franchise Payments	16
6.2.1 Initial Fee.	16
6.2.2 Royalty Fees	16
6.2.3 Advertising and Promotion Fee	16
6.2.4 Fees for Specific Services	16

<u>Legal Material Development on Franchising</u>		<u>Final Report</u>
7-	Relationship and Distinction between Licensing and Franchising	16
8-	Role of Intellectual Property Assets in Franchising Arrangements	18
9-	An Overview of the Domestic Legal Framework Governing Franchising Agreements	20
10-	Recommendations	35

Referenced Documents:

www.wipo.org;

J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY , Second Edition .

www.ipmall.fplc.edu

www.franchiseassociations.com

www.franchise.org

lnweb18.worldbank.org

www.entremkt.com

www.axxs.com/lawctr/lawctr.htm

www.smetoolkit.com

International Bureau of WIPO , Franchising Guide , Geneva 1994

ifc.org/sme/html/sme_definitions.html

www.ilo.org

ilocarib.org.tt/infosources/sme/definition

www.british-franchise.org/whatis.asp

www.eff-franchise.com <<http://www.google.com>

www.eff-franchise.com

www.franchisebusiness.co.uk

www.franchise.org

www.toolkit.cch.com/tools/franch

frain.org.za/information/legal/agreement.html

www.themanagementor.com

unidroit.org/english/publications/franchising/main

www.vfexpo.ca/fourtypes

www.ftc.gov/bcp/franchise/top

www.thepizzaman.com/franchise-agreement

www.thepizzaman.com/franchise-agreement.html

www.smetoolkit.org

www.franchiseopportunities.com

www.whichfranchise.com

www.franchisesolutions.com

Abbreviations:

MSEs	Micro and Small -Sized Enterprises
SMEs	Small and Medium-Sized Enterprises
IP	Intellectual Property
IPR	Intellectual Property Rights
TM	Trademark
R&D	Research & Development

Glossary:

Franchisor	The party that owns a product, service, trademark or business format and provides this to a business owner in return for a fee and possibly other considerations. A Franchisor often establishes the conditions under which a business owner operates but does not control the business or have financial ownership.
Franchisee	The Party who purchases a Franchise from a Franchisor and operates a business using the name, product, business format, and other items provided by the Franchisor. He is the purchaser of the Franchise who has acquired the right to operate the system and use the trade name and/or trademark of the Franchisor under the terms agreed under the Franchise contract.
Operations Manual	The bible setting out how the Franchise should operate. This is the system introduced by the Franchisor which the Franchisee has bought into and must follow. It is based on the Franchisor's experience and best policy and procedures. This manual is the essence of the Franchisor's expertise and proficiency, which, if followed accurately by the Franchisee, forms the success package that he needs to operate smoothly and fruitfully
Intellectual Property	All kinds of creations of human mind be it inventions, literary and artistic works, symbols, names, images, and designs used in commerce. It includes the rights relating to: (1) literary, artistic and scientific works; (2) performance of performing artists, phonograms and broadcasts; (3) inventions in all fields of human endeavor; (4) Scientific discoveries; (5) industrial designs; (6) trademarks, service marks and commercial names and designations (7) protection against unfair competition; and all other rights resulting from intellectual activity in the industrial , Scientific, Literary or artistic fields. ⁽¹⁾

¹ - www.wipo.org; J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY , Second Edition .

1- Introduction

1.1 History & Overview

The concept of Franchising as it stands today has started in Germany in the 1840, whereby certain ale brewers have granted Franchising to certain taverns to sell their ale. In 1851, the Singer Sewing Machine Company started granting Distribution Franchising in respect of their sewing machines under certain written Agreements, which were the forerunners of modern Franchising Agreements.

In the 80's the Franchise concept has started having a significant impact on the Global economy, due to its great impact on both returns and risks, thus by increasing the financial returns and reducing financial risks of Franchised businesses compared to non-Franchised businesses.

The concept and vigorous image of Franchising has proved to be a successful business idea in different countries and cultures all over the world, and thus has expanded globally including the Middle East and Africa, where significant expansion have been seen in Franchise and employment numbers.

Today, a variety of businesses, have been successfully Franchised, and Franchising is the most popular system for growing a business in the United States, as it has come to account for an estimated 35-40% of the Gross National Product ⁽²⁾

The following statistics concerning the United States franchised firms are compiled by the International Franchise Association to illustrate the popularity of Franchising. ⁽³⁾

- Sales from Franchisees are about \$1 trillion a year.
- Franchise operations account for almost 50% of all retail sales.
- Out of 12 businesses there is about 1 Franchised operation-almost 600,000 businesses.
- Franchised establishments employ more than 8 million people.
- A Franchised business has an average of 8 to 14 employees.
- A new Franchise establishment is opened every 8 minutes of a business day.
- There are 86% of Franchise operations have the same owner five years after starting business and have less than 3% failed over that same time.

With the above information, it is not surprising that it will remain one of or the most significant form of business expansion throughout the 21st Century.

² <http://www.ipmall.fplc.edu>

³ <http://www.franchise.org>

In Jordan and although Franchising has been recognized as a tool of conducting business and marketing since late 70s, it is nevertheless still deregulated. The Jordanian Legislator did not regulated Franchising Agreements and/or Contracts, following thereof the general trend adopted by many countries of the world, which acknowledges that Franchising does not necessarily require any special regulatory and/or legislative structure in order to function and develop.

From a legal perspective and due to its contractual character and/or nature, Franchising contracts are actually governed by Civil Law, however and although the basic relationship is a contractual one, Franchising is a form of business that touches upon many different areas of law, and thus it is governed under the scrutiny of several areas of governance. Below hereunder and under section 9 of this report, we will be illustrating the legal framework under which Franchising Agreements and/or Contracts are governed and regulated in Jordan.

As the theme of our report is related to introducing Franchising Arrangement for MSEs we will highlight therefore the importance of Franchising, and its advantages as a business tool for enhancing the growth of MSEs, and strengthening their productivity , however and as there is no universally accepted standard definition of what constitute MSEs , the said definition is based in most countries on the enterprise's number of employees, the level of assets, enterprise's sales turnover or a combination of such criteria's thereof . In some cases even institutions within a country defer in their definition depending on activities and objectives of the defining institutions.

All in all the definition is to a great extent influenced by the level of economic development of the defining country, however and for the purpose of this report it should be understandable that the MSEs refers to those with the prime objective of profit maximization, and has 10 or less employees. Thus the said MSEs could be operating in any sector or industry, e.g. manufacturing, services, distribution, supply...etc.

1.2 Definition & Brief Explanation About the Nature of Franchising

Franchising is a system of marketing and distribution of goods and/or services, based upon a close and ongoing collaboration between legally and financially separate and independent undertakings, whereby the Franchisee is granted -in return for a fee- the right to market the goods and/or services of the Franchisor, in accordance with established standards.

Franchising is also considered to be a business system in which the owner of an IPR licenses others to operate business outlets, using such a right to identify products or services that are made and/or advertised by the Licensor/Franchisor.

Under the Franchise Agreement, the Franchisor has the right to define concepts and impose certain obligations according to which the Franchisee should conduct his business. This right entitles and compels the Franchisee in return for financial consideration.

The right to use the Franchisor's trade name,, trademark , service mark, know-how, technical methods, procedural system, and other IPR , is also supported by continuous provision of

commercial and technical assistance, within a certain framework and under defined terms, to be agreed upon and identified between the parties through a written Franchise Agreement.⁽⁴⁾

Accordingly, in one sense, a Franchise system is built upon a framework of trademark and/or service mark's license, fleshed out with various rights and obligations on the Franchisor and Franchisee. A Franchisee falls somewhere on a spectrum in between full independent entrepreneur and a hired clerk in a company-owned outlet.⁽⁵⁾

Tied to the definition of a Franchise is a clear conception of the peculiar blend of independence and dependence, which constitutes the particular business arrangement of Franchising. On one hand, in a Franchise relationship, the Franchisee possesses an independence conferred by virtue of the fact that the Franchisee is granted the right by the Franchisor to actually own and operate the Franchise business. As a result, the Franchisee is the one who actually runs the business and bears the risk where it is not successful. Indeed, the Franchisee actually purchases the right to operate and own the business from the Franchisor by paying a "Franchise Fee". On the other hand, the Franchisee is singularly dependent upon the Franchisor due to the fact that the success of the business largely depends upon the Franchisor's expertise, method of operation and commercial identity. This particular convergence of independence and dependence is the hallmark of a Franchise, and without it, there is simply no Franchise.

While some Franchisors maintain that a Franchise is merely an embellished license and therefore revocable at will, some Franchisees contend that a Franchise is a license coupled with a fiduciary interest, not subject to control by Franchisors, and from a legal standpoint, Franchising is one of the most difficult and intricate forms of IP licensing.

Because of this dispute, a universal definition for "Franchise" does not appear in every Jurisdiction's legislation, court decision or regulations, and if such a definition did exist, it would fail to encompass the many functions inherent into the system. Moreover, such a definition would not give any indication of the system's complexity and potential for abuse.

2- Franchising for Micro and Small Enterprises (MSEs)

The new liberated era and globalization will bring about further changes in attitudes and business conduct of MSEs, whereas such a category shall be obliged to keenly search for better opportunities and material advantages lying beneath, and expand its presence globally, in order to survive and compete, allowing thereof for a very strong social and culture interchanges. All of such shall reflect on a more thriving Franchise system around the world.

It is becoming widely recognized that MSEs plays a greater role in the rapidly changing global economic environment, and whereas MSEs contribute significantly to the economy, in some instances, their growth rate exceeds that of large corporations, thus and at a time

⁴ <http://www.franchiseassociations.com>

⁵ J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY, Second Edition,

when Franchising has proven to be a very successful tool in handling poverty and unemployment, and in providing a simple yet very influential package for success, it has also proven to be an effective way for upgrading, raising , and improving the productivity of MSEs .

On the other hand, Franchising has played a key role in generating a middle class in the American community, as many interesting stories have been told about Franchising for micro and small businesses, and how a small and challenged industry managed to outgrow because it franchised its business, industry, or system. Worth mentioning that increasing numbers of minorities and women are discovering that Franchising can be a good opportunity for everybody, whereas it has been recently announced that women, make up roughly 80% of current Franchisees in the U.S.⁽⁶⁾

This has resulted in an international consensus on the role of Franchising as a vital component of the business strategy for MSEs, in addition changing the culture of MSEs by means of creativity and corporate success will foster the innovation potential of MSEs, and encourage them to more effectively use the Franchising system as part of their business strategy.⁽⁷⁾

An interesting trait of Franchising is that it works well in all aspects and possibly under all circumstances, as it does not require advanced and well established businesses to make it work, quite the contrary, Franchising as a business method is a guaranteed formula for clean and promising startup for what otherwise would fall under the “trial and error” approaches of doing business.

In addition, Franchising provides a mean for mitigating the traditional obstacles that otherwise competent and capable small investors, particularly MSEs, face such as lack of business experience and capital. And where financial constraints force MSEs to fail commercializing their business, introducing Franchising system as a method of marketing facilitates expansion into large enterprises. Meanwhile MSEs can effectively use Franchising to secure new markets or identify potential strategic partners who would enhance the position it's in a certain market.

Whereas understanding the role that MSEs play in boosting the economy, and improving their competitiveness is a global phenomenon, and has been on the agenda of most governments as an integral part of their policy and national success, in Jordan there is lack of adequate attention and support for such a category of enterprises, in addition there is no policy and regulatory framework to stimulate development in this sector, and as a result MSEs have been incapable of projecting a clear statement of their importance in the national economy, in addition most of these enterprises remain lodged in the informal sector, without any significant development , which thus increases their costs and excludes them from the principal instruments of support.

We believe that strengthening the protection of MSEs, and formulating an overall Franchising strategy , shall go hand in hand with the Kingdom's economic and investment reform initiatives and is particularly relevant in job creation, export of trade , and

⁶ <http://www.franchise.org>

⁷ <http://lnweb18.worldbank.org>

domestic investment promotion , in addition to positive contribution to social and political tranquility .

According to the above it is very clear that, introducing the concept of Franchising for MSEs can play an eminent role in helping such a category of enterprises to attain a better chance reaching a sustainable development

3- Importance and Business Advantages of Franchising

Franchising proved to be a safer way to conduct business within a trade or industry as it provides an excellent opportunity for rapid expansion without an enormous outlay of capital. It is a distribution system that allows a business to conserve capital, and at the same time achieve fast market penetration making it a very attractive proposition to most business owners.

According to every government survey, Franchising has experienced explosive growth since the mid-70s and is expected to be the leading method of doing business in the new century. There are approximately 15,000 Franchise companies with a million Franchisee around the world. Franchising has constituted 50% of the Retail Sales in the USA , 25% in Spain , 20% in Germany and 19% in the UK.⁽⁸⁾

3.1 Franchiser' S. Benefits

- Without the expenditure of capital, but instead with an infusion of capital, the Franchisor may engage in rapid system expansion and market penetration, and will set up a nationwide network using the capital investments of the Franchisee⁽⁹⁾ and where the Franchisor is also the manufacturer or wholesaler for any of the products or services used by the Franchisee, the availability of an assured distribution network may considerably increase the manufacturer's profits by reducing the need for large inventory, providing an assured demand, and eliminating wide fluctuations in sales and close-outs
- While the Franchisee shall independently provide the talent, inspiration, enthusiasm, and customer contact, the attributed goodwill, which is frequently cited as the most fundamental element of the business, shall be cited for the Franchisor.
- The Franchisor shall get 100% commitment and acquire the aggressive self-motivation of the Franchisee, who has a stake in the business rather than being an ordinary employee, or a manager working for a salary and thus may be less motivated.
- In the purely financial sense, the Franchisor may reap generous rewards from a verity of sources. He shall obtain a substantial fee for the sale of the Franchise, regardless of whether the fee is paid in full or in

⁸ www.entremkt.com

⁹ J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY , Second Edition.

installments. In the service industries, the Franchisor usually charge for a royalty in return of use of the trademark and the business system.⁽¹⁰⁾

- Non-financial benefits to the Franchisor include the ability to motivate and control huge number of indirect employees, as the Franchisor may not be able to afford the cost of an administrative hierarchy, including high salaries, to handle such a number of employees.
- The Franchisor also receives the benefit of the constant accretion to the value of his trademark or service mark. Franchisees services and their devotion to duty all materially enhance the value of the Franchisor's trademark and/or service, in addition and where Franchisees increase their sales, Franchisors profit from the strengthening of their own name recognition which directly enhances the value of the Franchise system as a whole and gives value to every Franchise they sell.

3.2 Franchisee's Benefits

- Franchisees enjoy the advantage of a lower failure rate than other start-up businesses, as they are buying an established business concept.
- Franchisees are given access to an entire network, which gives them a competitive advantage as they are getting access to a proven product and/or service that has been advertised and is known to customers.
- Franchisees get a complete package of business, which includes trademarks, easy access to an established product; a proven marketing method; equipment; inventory; etc.⁽¹¹⁾, in addition they get the internal benefits from a standardized management system, and will benefit of various proven systems including financial and accounting systems; ongoing training and support; research and development; sales and marketing assistance; planning and forecasting; inventory management; etc.
- Franchisees shall also benefit from the expert guidance that they obtain from Franchisors in financial and site selection assistance, as while Franchisors assist financing the initial Franchise, they also may help with site selection, making sure that the franchised business is located in an area where it can thrive.
- Franchisees benefit externally from producing better results in their individual operations, while increasing customers' acceptance throughout the franchised system.

¹⁰ <http://www.axxs.com/lawctr/lawctr.htm>

¹¹ www.smetoolkit.org

4. Structures for Carrying Out Franchising

Many countries of the world acknowledge that Franchising does not necessarily require any special regulatory or legislative structure, as it is a result of a contract, and therefore like any relationship, the parameters under which the Franchisor and Franchisee are obliged to operate are usually clearly defined within the Franchise Agreement, being the formal contract indicating the format adopted whilst governing the relationship.

There are several structures for carrying out Franchising, which set the rights, duties, obligations and activities that each party pledges to undertake and perform. A number of different species of Franchise Agreements and relationships may exist to properly implement the Franchisor's business objectives.

4.1 Unit Franchising: is the most straightforward way in which Franchising can be carried out, in addition it is the most applicable structure of Franchising for MSEs.

Also known as “**Individual Franchising**”, it is the most common structure in domestic situations – i.e. where the Franchisor and the Franchisee are in the same country. In international dealings, as the Franchisor may find that a different approach in the Franchisee's country necessitates establishing a local presence there in the form of a master Franchiser.⁽¹²⁾

Under Unit Franchising, the Franchisee is given the right to develop and operate one outlet at a specific location or within a defined territory. However this right of developing only a singular outlet, does not negate granting additional, and/or acquiring additional Franchises within other defined areas, subject however to performance criteria and structured as either options or right of first refusal.

Unit Franchises may be also offered as an incentive for growth for existing Franchise owners, with additional Franchises granted to successful Franchisees.

4.2 Area Franchising: also referred to as “**Territorial Franchising**” aims at covering a substantial territory or a geographical area by setting up simultaneously or successively, a number of units, shops or outlets, over an agreed period of time. Two forms of setting up territorial Franchise are the “Franchise Developer Agreement” and the “Master Franchise Agreement”, which may be also combined.

¹² International Bureau of WIPO, Franchising Guide , Geneva 1994.

4.2.1 Developer Franchise Agreement: Under such an arrangement the Franchisor is directly linked with the Franchisee, who is expected to open and operate several units. This Franchise will include a “Development Agreement”⁽¹³⁾ whereby the Franchisee is required to develop the assigned territory by establishing a number of Franchise units or outlets which he will usually own directly. In this case the Franchisee will not sub- Franchise out to third parties.

4.2.2 Master Franchising: under such an arrangement, the Franchisor grants the Franchisee the right, to grant Franchises to third parties, usually called “sub Franchisees.” To exploit fully the potential business opportunities in the larger geographical area. It may be agreed that some of those sub Franchisees will run more than one Franchise. This approach of Franchising is particularly important in international Franchising, where the Franchisor intends to establish Franchise operations in a given country, in which he may have no business experience.

¹³ International Bureau of WIPO, Franchising Guide, Geneva 1994.

5. Types of Franchising

There are many different forms and kinds of Franchising; however Franchising may be divided into three basic types as follows:

5.1 - Manufacturing Franchise is one in which the Franchisor grants manufacturing rights, under which he permits the Franchisee to make and sell products under the Franchisor's TM and trade name using specific materials and/or specifications and/or techniques also supplied by the Franchisor. This type of Franchise is found most often in the food and beverage industry, whereby the Franchisor supplies an essential ingredient, raw materials or technical knowledge to a processor or manufacturer (the Franchisee) and licenses him the use of his trademarks, trade name and in some instances trade secret information or patented technology.

5.2 - Distributing Franchise: is one in which the primary purpose is for the Franchisee to serve as an outlet for products manufactured by or for the Franchisor, thus under a Distribution Franchise, the Franchisor (or someone else on his behalf) manufactures the product and sells it to the Franchisees who sell it from his end to customers, under the Franchisor's trademark. This type of Franchising provides the Franchisor with a distribution system to market its products, and is similar to an ordinary suppliers-dealer relationship, but the Franchisee has a greater identification with the Franchisor's trademark and might be precluded from selling competitors' products. Examples of such a type of Franchising include gas stations and automobile dealerships.

5.3 - Business Format Franchise: is one in which the Franchisor is primarily licensing a business format or a system, rather than selling goods or services. Thus in this type of Franchise, the Franchisor provides a license which entitles the Franchisee to trade under the trade mark/trade name of the Franchisor and to make use of an entire package, and/or a complete plan, or format, for managing and operating the establishment, comprising all the elements necessary to run a business with required training and assistance on a predetermined basis.

Under a Business Format Franchise relationship, the Franchisor typically does not manufacture any products but may offer to supply equipment, ingredients, raw materials, packaging materials, advertising, and so forth, means for distributing goods and/or services that has been developed, tested, and associated with the trademark, on the other hand, the Franchisee usually deals exclusively with the Franchisor's sponsored services, and is required to adopt the Franchisor's mark and overall presentation format as his exclusive trade identity. Business Format Franchising was known after the World War II, and is considered today as the dominant mode of Franchising types, in addition it is the ideal mode of Franchising for hotel/motel and fast food industries.

6. Terms & Rules of the Franchise Agreement

As there is generally no specific legislation governing Franchising transactions, the Franchise Agreement can be said to form the "engine room" of the whole transaction,

and becomes all-important in defining the relationship of the Franchisor and the Franchisee, and determining their rights and obligations, thus its provisions must be well balanced and drafted.

Compliance with the Agreement is very vital in the success of subject franchised business, and it means compliance with the standards, procedures and policies contained, developed and provided by the Franchisor as well as the Operations Manual.

Generally the Franchise Agreement should clearly specify the duties and obligations both of the Franchisor and of the Franchisee; state the grounds upon which the Franchisor will seek to terminate the Franchise Agreement; deal with the payment of Franchise fees; and set out the consequences of breaching the Agreement and its termination.

While the terms and rules of the Franchise Agreement vary depending upon the business format type and structure of the Franchise arrangement itself, in addition to its object and purpose, this report is not intended to deal with the terms and provisions of the Franchise Agreement, rather than highlighting the Franchise transaction as a business tool for MSEs, however we will merely highlight the major aspects of the Franchise Agreement, and the most common terms that should be clearly drafted and watched by both parties.

6.1. MAJOR OBLIGATIONS OF THE PARTIES IN THE FRANCHISE AGREEMENT

6.1.1 The Obligations of the Franchisor: The obligations of a Franchisor towards the Franchisee can be divided into two principal areas.

6.1.1.1 Efficient Licensing of The Intellectual Property Rights Incorporated into The Franchised System:

Licensing of the IPR is usually the core and heart of the Franchising system, as IPR are considered to be the key which enables Franchisees to operate the Franchised system, and gives them a competitive advantage over those who cannot use the same system. For example licensing of the Franchisor's trademark and/or service mark is the vehicle which enables the Franchisee to become part of the system of business.

Accordingly, efficient licensing of the IPR and strong protection thereof benefits both of the Franchisor and the Franchisee, since these rights constitute the competitive advantage of the Franchisee, according to which he operates the franchised system.

Any improper licensing of such IPR shall weaken the competitive advantage of the Franchisee, and shall defect the core of the Franchise Agreement, thus the Franchise Agreement should precisely identify the licensed IPR, and the manner of their use by the Franchisee.

More elaboration on this major issue is illustrated here below under section 8 of this report.

6.1.1.2 Transparent and Clear Communication and Transferal of the Franchised System:

The granting of the franchised system does not merely depend on drafting certain provisions in the Franchise Agreement to this extent, nor is it sufficient for a Franchisor to have developed a franchised system and franchise it, as it is very essential to allow and assure effective use of the franchised system.

For this purpose the Franchisor is obligated to efficiently provide the Operating Manual, which consists of the information necessary for actual carrying out of the franchised system including the operation standards, best policy, and procedures for running the business.

The Operation Manual is one of the most important means of communicating the franchised system, however the franchised system should be also communicated through training, assistance and continued support provided by the Franchisor.

6.1.2 The Obligations of the Franchisee: the Franchisee's obligations can be divided into two basic areas:

6.1.2.1 Compliance With the Franchised System:

The Franchised system developed and established by the Franchisor consists of standards, methods and procedures, compliance with which is an important factor in taking the best advantage of the commercial opportunities existing under the Franchise Agreement, in addition to being the main factor of the Franchisee's success. Such systems and requirements also include operation manuals, quality control requirements, confidentiality requirements, approved suppliers, raw materials and sources, inspection rules...etc

Not only will the income of both parties to the Franchise Agreement depend upon such compliance, but also the creation of clients' base and the extent of market share will also be contingent such an obligation.

6.1.2.2 Payment of Fees: One of the most important provisions in the Franchise Agreement is the identification of the various fees to be paid by the Franchisee to the Franchisor, the method of such payments, and its calculation.

Information on the fees to be paid is important to the Franchisee because one of the major areas of consideration will be the Franchisee's ability to raise sufficient funds to enter the Franchise relationship and eventually open one or more franchised units. The Franchise Agreement should specify all payments to be made by the Franchisee to the Franchisor, including any initial payment, also called an "Entrance Fee," for granting the Franchise, and ongoing royalty payments, payment for advertising and promotion, security deposits and any other payments.

6.2 Types of Franchise Payments:

6.2.1 Initial Fee

The Initial or “**Entrance Fee**” is typically a lump-sum payment, although it may be paid in installments (for example, 25% on signing the contract, 25% on completion of training, 25% on opening of first Franchised unit, etc which is regarded by the Franchisor as a payment for licensing his IPR, or for the initial training and administrative expenses associated with establishing the new Franchised unit.⁽¹⁴⁾

6.2.2 Royalty Fee

The Royalty Fee is a continuous fee paid by the Franchisee to the Franchisor, and is usually a percentage of the gross revenue earned by the Franchisee. Royalties paid by the Franchisee may be regarded the Franchisor’s basic source of income, representing payment for the continued use of the Franchised system. It should also be calculated in way to pay back the Franchisor for his R&D efforts and the franchised system.

6.2.3 Advertising and Promotion Fee

In most Franchising relationships, it is of critical importance for the success of individual Franchised units, and for the Franchised system as a whole, to advertise and promote both the units and the system, which ensures a continuing demand for the Franchised products or services.

Payments made by the Franchisee for advertising or promotion are therefore not properly “fees” which go to the Franchisor, but rather constitute an obligation to spend specified payments on advertisement. Such specified amounts can be divided among local, regional, national, or even international promotion efforts.⁽¹⁵⁾

6.2. 4 Fees for Specific Services

In most Franchises, the Franchisor has an ongoing responsibility to render advice services to the Franchisee on the management of franchised units, the form and content of systems, the updating of the Franchise. The Franchise Agreement shall therefore provide fees for such advisory services.⁽¹⁶⁾

7 - Relationship and Distinction between Licensing and Franchising

In its broad sense licensing is the permission granted by the licensor to the licensee enabling the latter to use a certain IPR owned by the licensor under certain conditions and terms in exchange for a fee .

¹⁴ International Bureau of WIPO, Franchising Guide, Geneva 1994.

¹⁵ International Bureau of WIPO, Franchising Guide, Geneva 1994.

¹⁶ International Bureau of WIPO, Franchising Guide, Geneva 1994.

In Franchising, the license granted by the Franchisor to the Franchisee to conduct business in the manner developed by the latter is basically the heart of the Franchising arrangement, and is crucial to allow the Franchisee to utilize the franchised system and conduct business.

Having said so, we still have to keep in mind that the scope of Franchising goes beyond the mere licensing of one or more specific IPR. Thus and while the subject matter in licensing arrangements is the licensed IPR, it is that system developed and established by the Franchisor which constitutes the subject matter of the Franchising arrangement. There is also an extension in the role and tasks handled by the Franchisee under the Franchising arrangement, where the Franchisee does more than mere selling of goods, or providing of services under a trademark and/or service mark, to manufacturing, distribution, selling or providing goods and services as part of a larger system.

On the other hand, the control exercised by the licensor in the licensing arrangement, is merely to the extent that is necessary to ensure commercial exploitation and/or use of the goods or services produced or offered under the license, so as to meet the required quality standards, and to maintain the goodwill of the licensed IPR. In contrast, in Franchising the Franchisee shall adhere to, and shall operate in compliance with the Franchisor's standards, and specifications as illustrated in the Operation Manual, thus and on the contrary to licensing, the Franchisor, shall not only supervise the manner in which specific rights, such as trademark rights, are used by the Franchisee, but also prescribe the manner in which the fundamental aspects of the Franchised system are implemented and managed. Therefore, the extent of the Franchisor's influence over the Franchisee is greater than that of a licensor over a licensee.⁽¹⁷⁾

However, and in exchange for the control excised by the Franchisor over the Franchisee, the Franchisee shall get continuous assistance, training and supervision by the Franchisor, which include establishing, maintaining and promoting the Franchised unit, development of new and improved standards and methods of operating and ongoing management services.

While the parties of both licensing and Franchising arrangements are independent of each other, both of them still have an ongoing working relationship defended by the terms of the license and/or Franchise Agreement itself, in addition the income and success of each party highly depends on the other, however, and in contrast to the licensing arrangement, the Franchisee's success is also dependent upon the Franchisor's ability to develop a profitable system, which includes training on the proper operation of the system, supervision or monitoring the Franchisee, and providing assistance and support, all of which shall enhance the likelihood of success. Thus, in a Franchise arrangement, at least part of the ongoing nature of the

¹⁷ International Bureau of WIPO, Franchising Guide, Geneva 1994.

relationship presupposes the Franchisor's continuing to develop the franchised system and communicating the new developments to the Franchisee⁽¹⁸⁾

Despite this relationship between licensing and franchising, it is worth mentioning that a trademark license is not necessary in Franchising Agreement where the Franchisee merely distributes or sells the product for the Franchisor and/or TM owners' name. Likewise the license is also unnecessary if the Franchisee manufactures the product for the Franchisor and/or TM owner, and the Franchisor himself sells or distributes the product. .

However TM license is necessary in manufacturing Franchise where the Franchisee manufactures and sells a product bearing the trade mark to someone other than the trademark owner and/or the Franchisor, in which case license of the trademark itself becomes part of the Franchising system.

8- Role of Intellectual Property Assets in Franchising Arrangements

In this era where consumers are relatively well informed, and where competition is increasingly gaining strength due to the existence of substituting /competing products and services, efficient use of Franchised IPR plays a significant impact in enhancing and leveraging MSEs success in respect of new products/ services in the marketplace, and in building market exclusivity, business partnerships, strategic relationships and customer loyalty.

Thus, and as a part of emphasizing the Franchising system for MSEs , it is equally important , to achieve the effective use of IP systems as part of business strategies , as Franchising reflects the reality that domestic economies and world trade depends increasingly on the value of IPR , the subject matter of goods and services.

Such a reality contributes to the allegation that IPR licensing is the key element of the Franchising arrangement and the most critical component thereof. And as most enterprises use earnings and asset value, as a measure of sale value of a company, MSEs have to increasingly look at technology and know how embodied into their IR systems, to improve their productivity, effectiveness and competitiveness, specially in view of today's knowledge – driven business environment, where wealth is measured in terms of knowledge based systems.

While MSEs' growth is limited by heavy competition and high cost of credit, the competitive edge of successful industries or business, whether big or small, is increasingly based on strategic business management of their intangible and IP assets. Thus franchising arrangements will provide a golden opportunity for MSEs to expand at a lower cost, while at the same time improve the average quality of services offered by small businesses.

¹⁸ International Bureau of WIPO , Franchising Guide , Geneva 1994.

It is accurate to say that successful Franchising depends on establishing, maintaining and where necessary, enforcing strong IPR, therefore the Franchise Agreement should not only grant relevant rights to the Franchisee and reserve rights for the Franchisor, but should also contain mechanisms necessary for protecting the Franchisors' IP from infringement.

The Franchise Agreement should specify, the ownership of the subject IPR, the extent and limitation of its licensing, whose obligation is it to take care of or follow up the administrative procedures that have to be pursued in its respect before local authorities, and whose obligation is it to take action in defense of any infringement that might take place thereof. It may be agreed, for example, that the Franchisor must prosecute any infringer, but the Franchisee must provide cooperation and assistance for that purpose.

The key challenge for Franchisors is to control the use of their IPR and to restrict such a use in the Franchise Agreement, so as to foster a uniform standard among the system's independently owned operations. Without this control, and unless the Franchise Agreement contains sufficient safeguards to protect Franchisors' IPR, Franchisors may find themselves incapable of preventing infringement upon their IPR, and anyone would be able to use their brand names, know-how, and creative works in any manner in derogation protected IPR. ⁽¹⁹⁾

Franchisees should be aware that it is not only the interests of Franchisors that such IPR be protected, as Franchisees are equally concerned to ensure that Franchisors had done everything that is reasonably possible for him to protect the intellectual property rights in question.

Many Franchisees purchase a particular Franchise because of the high profile a Franchise enjoys in the market place, it follows therefore that the Franchisee shall be anxious to ensure that in the event of infringement, the Franchisor has taken sufficient steps to safeguard his ownership in his IPR, so that he can stop infringement and thereby protect the reputation of that brand name both for himself and for his Franchise network. If the Franchise Agreement is weak on this point, Franchisees will not consider that particular Franchise to be a sound investment proposition.

Trademarks have historically ranked first in importance in Franchising Agreement, which is due to industry's heavy reliance on trademarks in manufacturing, marketing and distribution of goods and services. Soft drink bottling, dating back to the late nineteenth century, was one of the earliest examples of Franchising, followed by auto dealerships and gas station Franchises. Franchisees facilitated the expansion of these Franchise systems by investing their own funds and managing the local Franchise businesses. In each case, the parent company owned the trademarks, provided the standards for uniformity throughout the system, and created a marketing image. As a result, "Coke," "Pepsi," and "7Up" are bottled and sold throughout the world today by independent, franchised bottlers.

¹⁹ www.fplc.edu

And while **copyright and patent law** has historically had a less significant impact on Franchising. However, should the Franchise system include original expressions, which may qualify for copyright protection, or should it include a practical solution in respect of any problem related to product or process in an area of technology, the issue of safeguarding and protecting the copyright and patent right should be mentioned in the Franchise Agreement.

On the other hand, where the franchised system includes any confidential information and/or know how and/or trade secret then sufficient provisions governing such IPR should be inserted in the Franchise Agreement.

A detailed illustration of the legal framework governing such IPR is mentioned under section 9, however below hereunder, is an overview of the nature of IPR that are usually Franchised.

Trade Marks and Service Marks Any clear sign, of words, slogan, design, picture or any other symbol used by any person and/or entity to identify and distinguish his/ its goods, products or services from the goods, products, or services of others.

Patents The exclusive right granted for an inventor in respect of any **inventive** idea reached in any of the fields of technology,, which is related to a product, or a process, or to both, which provides a practical solution to a particular problem in any of the said fields.

Confidential Information and know-how: Information that enables one to accomplish a particular task or operate a particular device or process Know-how usually denotes a particular kind of technological information that enables the possessor of the information to accomplish a given task ⁽²⁰⁾ .

Copyright; The right given to authors of literary and artistic works expressed in writing, sound, drawing, photography or movement.

Trade Secret: Broadly speaking, any confidential information that provides the enterprise with a competitive advantage in the market place shall be deemed to be as trade secret, as long as they are kept confidential either as a whole body or in the precise configuration. The commercial value of such confidential information and/or trade secret must emanates from the fact that it is a secret, and while trade secretes does not require registration the right holder must prove that it has been subject to reasonable steps under the circumstances, by him, to keep it a secret.

9- An Overview of the Domestic Legal Framework Governing Franchising Agreements

As we had previously stated, there is no specific legislation, and/or legal structure that regulates and/or governs the Franchising Agreements in Jordan.

²⁰ J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY , Second Edition

And while the Jordanian legislator had not regulated the Franchise Agreement, the said contract falls under the umbrella of a commercial contract, whereas it involves a commercial activity and seeks to make profit. Here below is a listing of the Jordanian Legislation applicable to domestic Franchising Arrangements, in addition, enclosed herewith and marked as Appendix A, is a matrix of related Articles that should be noticed and/or that applies to the Franchise Agreement, bearing in mind that both of the listed schedule and the enclosed Appendix are only restricted to illustrating the general framework of the involved legislation, bearing in mind that there other legislation which might governs the subject matter of the Franchised Agreement and/or Contract itself, for example where the Franchising Arrangement pertains to restaurants, the Food Control Law, and the Public Health Law, should be also noticed .

First	:	The Jordanian Civil Code No. 43 for the year 1976.
Second	:	Related Intellectual Property Legislation, and mainly the following legislation:

1		Unfair Competition and Trade Secrets Law No. 15 for the year 2000.
2		The Trademarks Law No. 33 for the year 1952 and its amendments for the year 1999.
3		Law of Trade Goods Law No. 19 for the year 1953.
4		Patent Law No. 32 for the year 1999 and 2001.
5		Copyright Law No. 22 for the year 1992 and its amendments for the year 1998 and 2001 .

Third	:	The Law on the Registration of Trade Names No. 30 of 1953.
Fourth	:	The Commercial Law No. 12 for the year 1966.
Fifth	:	The Jordanian Labor Law No. 8 for the year 1996 and its amendments for the year 1997, 1999, 2001 and 2002.
Sixth	:	Taxation Legislation:
1	:	The Income Tax Law No. 57 for the year 1985.
2	:	The General Sales Tax Law No. 6 for the year 1994 & The Regulation No. 81 for the year 2000 Concerning Registration Threshold For Sales Tax Purposes.
Seventh	:	The Investment Promotion Law No. 16 for the year 1995 and its amendment for the year 2000.
Eighth	:	The vocational License Law No. 28 for the year 1999 and its amendments for the year 2002.
Ninth	:	Companies Law No. 22 for the year 1997 and its amendments for the year 2002.
Tenth	:	The Stamps Duties Law No. 20 for the year 2001.

Eleventh	:	Provisional Financial Leasing Law No. 16 for the year 2002.
Twelfth	:	Commercial Agents and Mediators Law No. 28 for the year 2001.
Thirteenth	:	The Aqaba Special Economic Zone Law No. 32 for the year 2000.

First: The Jordanian Civil Code No. 43 for the year 1976

The contractual issues in the Franchise Agreement are governed under the general and traditional principles of Civil Law. The Jordanian Civil Code No. 43 for the year 1976 is considered to be the bible of contractual relationships that provides the general framework of contractual issues, thus and while the Jordanian legislation has not regulated and/or identified the Franchise Agreement and/or Contract, the definition of a contract under Article 87 of the Civil Code is applicable to the Franchise Agreement as the said article provides the following:

“The contract is the joining and consistence of the offer from one of the contracting parties with the acceptance from the other in a manner which proves the effect thereof on the object of the contract and the obligation of each party by what he is bound with to the other.”

According to the above, and provided that the contract does not violate Public Order and Morals, the will of a person can conclude or form any kind of a contract. On the other hand the general legal principle provides that *“The contract is the contractual Doctrine of the contractors.”*

Thus, and falling under the general definition of a valid contract according to Article 87 of the Civil Law, the general provisions regulating the conditions of the contracts including capacity of the contracting parties, offer and acceptance, and cause, as stipulated in Articles (116–166) of the Civil Code applies to the Franchise Agreement and should be adhered to.

The contracting parties (the Franchisor and the Franchisee in the Franchise Agreement) should also take notice of Articles (199-249) of the Civil Law which govern the dissolution of the contract, and its consequences. Moreover, the general rules regulating the theory of the injurious act and guarantees as stipulated in (256 – 272) of the Civil Law applies to the Franchise Agreement.

Last but not least, and although not directly connected with Franchising Agreements, the provisions of articles (920-940) of the civil code should be noticed where there is insurance.

Second: The Intellectual Property Legislation

IPR are the basis upon which the Franchise relationship is built, thus they are of fundamental importance and should be noticed. In international relationships the international conventions and other regulations of international origin must be taken into account.

IPR included in the Franchise Agreement are established and maintained in accordance with the national Jordanian laws governing such rights.

We will be highlighting here below, each of the four bodies of IP legislation governing such rights.

1- Trade Secrets & Confidential Information are protected under the:
- *Unfair Competition and Trade Secrets Law No. 15 for the year 2000.*

Where the Franchising Agreement includes in its nature a trade secret which the Franchisor cares to protect and in which time, effort and money were spent to reach such a secret, the above law governing trade secrets should be noticed.

The Jordanian Legislator has defined the trade secret as any information which:

- 1- Is considered as secret in the sense that it is not, either as a body or in the precise configuration, generally known among, or readily accessible to persons within the circles that normally deal with the kind of information in question.
- 2- Has a commercial value because it is a secret.
- 3- Has been subject to reasonable steps under the circumstances, by the right holder, to keep as a secret.

The holder of the trade secret has the right to use his secret and to reveal it to others or to keep it for himself; on the other hand he has the right to prevent any person from misappropriating it.

The Unfair Competition and Trade Secrets Law also spells out the general rules governing the lawsuit pertaining to infringement upon the trade secret by stipulating that the right holder is entitled to prevent any person from misusing the trade secret subject of protection.

Article (6) of the same law has laid down the criterion of infringement or misuse of the trade secret by saying that if any person obtains a trade secret, uses or reveals thereof in a way that is contrary to honest commercial practices without the approval of the right holder he would be therefore misusing the trade secret.

The holder of a trade secret shall have the right to demand compensation for the damage done thereto as a consequence of the infringement or misuse of the secret. Moreover, when filing his civil lawsuit on the misuse of the trade secret, or when the lawsuit is being examined by the court, he may request the court to stop the misuse and to impound the objects which contain the trade secret wherever they may be.

On the other hand, it is important to note that the same above legislation governs the issue of unfair competition as, and although not directly related to Franchising Agreements, fair trade practices are of relevance in the conduct of business under Franchising Agreement and must be recognized by both parties (i.e. the Franchisor and the Franchisee), especially if we know that according to the Unfair Competition and Trade Secrets Law No. 15 for the year 2000 any interested party may claim compensation for damages suffered, as a result of unfair competition.

Examples of acts of unfair competition which are considered to be in contradiction with honest practices in industrial or commercial activities are listed in Article (2) of the said law, and includes the following:

- A. Acts of such a nature as to create confusion with the establishment, the goods, or the industrial or commercial activity, of a competitor.
- B. False allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activity, of a competitor.
- C. Indications or allegations, the use of which, in the course of trade, may mislead the public as to the nature, the manufacturing process, the characteristics, and the suitability for their purpose, or the quantity, of the products.
- D. Any practice which may discredit the reputation of the product, or cause confusion in its external appearance, or the way it is displayed, or may mislead the public, in the course of announcing the price of the product, or in the way of calculating it.

2- Trademarks are protected under:

- *The Trademarks Law No. 33 for the year 1952 and its amendments for the year 1999;*
- *Law of Trade Goods Law No. 19 for the year 1953; and*
- *Unfair Competition and Trade Secrets Law No. 15 for the year 2000.*

The Trademark law is the major legislation that regulates and governs trademarks in the kingdom, and trademarks constitute an important element of any commercial project, the said law provides adequate converge compatible with the international standards to protects one's right to use a distinctive word, symbol, or other device to identify the source of goods or services, and prevent confusion by competitors using similar words, symbols, or devices.

The Trademark Law has specified the conditions of eligibility according to which a trademark shall be registered if it has distinctive characteristics in terms of names, letters, numerals, figurative elements, colors, or other characteristics, or any combination thereof, bearing in mind that the required distinctiveness applies in a manner which secures distinguishing the goods of the proprietor of the trademark from those of others, and if it was visually perceptible.

Thus the Franchisee should be aware of the value of the TM, and check its validity and eligibility to be protected and registered. Appendix A illustrates the relevant articles that have to be noticed in this respect thereof.

While the Trademarks Law regulates the issues of a trademark's assignment, transfer of ownership, or licensing granted by the trademark owner to others, it stipulates that any transfer, relinquishment, transfer of ownership, or license of use has to be registered at the Register kept at the Ministry of Industry and Trade.

According to the above, a Franchise Contract and/or Agreement which include licensing to use a trademark should be registered before the Trade Marks Register at the Ministry of Industry and Trade.

Finally, it is worth mentioning that according to the Trademarks Law, the trademark's owner (i.e. the Franchisor) enjoys adequate protection to cease any infringement upon his TM; such available measures are as follows:

- Civil liability: claiming damages including recovery of lost profit, expenses and attorney's fees.
- Criminal Liability: imprisonment for a period of not less than three months and not more than one year or to a fine not less than one hundred Dinars and not more than three thousand or both.
- Provisional measures:
 1. Cease the infringement.
 2. Place a provisional attachment on the product subject of infringement wherever found.
 3. Preserve the evidence related to the infringement.

The Trade Goods Law is another legislation that provides a comprehensive package for infringement, and penalizes the following:

Counterfeiting of a trademark.

- a. False use of a trademark or any similar trademark thereof, which leads to deceiving the public consumer.
- b. Use of False Commercial Description that uses any numbers, words, marks, signs or mixture thereof includes such false descriptions which consists of a trademark or,
- c. Selling or offering for sale, acquisition for the purpose of selling or for any other industrial or commercial purpose, of goods for which a counterfeited trademark or a false commercial description was used in a way which leads to deceit.

Unfair Competition and Trade Secrets Law is the Law that constitutes an umbrella for all kinds of acts of unfair competition, whether such acts involve infringement of trademarks or not, as according to the said law any interested party may claim compensation for damages suffered, as a result of unfair competition, provided that the petition is attached with a bank guaranty or a cash deposit accepted by the court:

- Cease the acts of such competition.
- Place a provisional seizure on the related materials and products, wherever found.
- Preserve relevant evidence.

On the other hand, such provisional measures could be initiated also before filing the lawsuit, and without notifying the counter-party through filing a petition to the court, provided that it is attached with a bank guaranty or a cash deposit accepted by the court, to take any of the measures, if any of the following is proved:

- 1- That the competition is committed against him.
- 2- That the competition is immanent and is likely to cause damages of irreparable harm.
- 3- That there is a demonstrable risk of evidence being disappeared or destroyed.

In all cases, a lawsuit has to be filed within eight days from the date the court approves the petition.

The court may order seizure of the products subject matter of unfair competition, and the tools and materials mainly used thereof. The court may order destruction of such products, tools and materials, or use of such outside the channels of commerce.

3- Patents are protected under:

- Patents Law No. 32 for the year 1999 and its amendments for the year 2002.

Patents law grants rights to inventors of new and useful products and process. A patentee receives the right to exclude others from using his patent without consent.

The patents Law has specified the conditions of patentability , accordingly the invention may not be granted a patent protection unless it is new in terms of industrial technology, involves a non- obvious inventive step, and capable of industrial application.

It should be noted however that the patent right is not confirmed before the final grant of the patent and/or issuance of the related certificate, thus the Franchisee should be aware of this fact.

According to the Patent Law, the patentee has the right to assign the patent to others, and to conclude licensing contracts for its exploitation, however the licensing contract should be registered at the Patent Register kept at the Ministry of Industry and Trade. Accordingly should the Franchising Contract and/or Agreement include licensing to use a patent, such a contract should be registered before the relevant authority thereof .

The granted license includes a personal right which enables utilizing the subject patent subject within the terms of the granted license, however it should be noted that the patentee shall continue to be the right holder of the subject patent.

Finally, the patentee (i.e. the Franchisor in the Franchising Contract) enjoys civil and criminal protection to cease any infringement upon his patent; in addition the Patentee has the right of using provisional measures. Details are illustrated in Appendix A.

4- Copyright is protected under:

- The Copyright Law No. 22 for the year 1992 and its amendments for the years 1998, 1999 and 2002.

Where the Franchised system includes innovated literary, artistic and scientific works and irrespective of their kind, importance or purpose of production, such works shall enjoy the protection of copyright and shall be subject to the Copyright Law No. 22 for the year 1992 and its amendments.

On the other hand, the general practice in Franchising Contracts stipulates that the Franchisor prepares and provides operating manuals, which include the necessary details explaining the system and method of work. Such manuals are subject of copyright and consequently any infringement upon such works and/or any part thereof, constitute an infringement, and entitles the Franchisor and/or copyright owner to file a lawsuit for infringement.

The protection provided under Copyright Law includes the following:

- Civil liability: claiming damages including recovery of lost profit, expenses and Attorney's fees.
- Criminal liability: imprisonment for a minimum term of three months and a maximum term of three years, and to a fine of not less than 1000 JD and not more than 3000 JD, or to either of the punishments.
- Provisional measures:
 1. Cease the infringement.
 2. Place a provisional attachment on the product subject of infringement
Wherever found.
 3. Preserve the evidence related to the infringement.
- Destruction of the copies or photocopies unlawfully published, along with the materials used in its publication.
- Alteration of features of such copies, photocopies, and materials so as to render them unfit for use.
- Confiscation and sale of the copies or reproductions of the work and of the material used for the reproduction.
- Upon the request of the judgment beneficiary the court may order publication of its judgment in one or more daily or weekly newspapers at the convicted party's expense.

Third: The Law on the Registration of Trade Names No. 30 of 1953

Trade Name is any symbol used to identify and distinguish companies, partnerships, and businesses, as opposed to marks used to identify and distinguish goods or services⁽²¹⁾.

And while Trade names are governed under the provisions of the Law on the Registration of Trade Names No.30 of 1953, it is worth mentioning that the said law does not include any provision that governs issues related to licensing the use of trade names to others, an important element under Franchising Arrangements.

On the other hand, the above legislation does not include any provision which deals with the issue of protection of the trade names, however civil protection of trade names is available under the provisions of the Commercial Law, while criminal protection is provided under the general provisions of the Penal Law No.16 for the year 1960.

We would like to point out that there is draft law Trade Names, which is expected to be enacted soon. The proposed draft law shall solve all the above-mentioned issues, as its current proposed articles include provisions governing the issue of trade name's ownership, transfer or licensing. According to this said draft law the trade name's name has the right to license the use of the trade name to others, and to conclude licensing contracts for its exploitation,

²¹J.Thomas McCarthy, MacCarthy's DESK ENCYCLOPEDIA of INTELLECTUAL PROPERTY , Second Edition .

however the licensing contract should be registered at the Trade Name Register kept at the Ministry of Industry and Trade.

Thus, and according to the proposed law expected to be issued soon, both of the Franchisor and the Franchisee should be aware to the issue of registration of the Franchising Contract and/or Agreement, where such a contract and/or agreement includes licensing to use the Franchisor's trade name .

On the other hand, the said draft law also entitles the owner of the trade name to adequate protection to cease any infringement upon his trade name, and provides the following:

- 1- Civil liability: claiming damages including recovery of lost profit, expenses and attorney's fees.
- 2- Criminal liability: a fine to be paid not less than 200 JD and not more than 1500 JD.
- 3- Provisional measures, in the form of
 - a) Cease the infringement.
 - b) Place a provisional attachment on the product subject of infringement wherever found.
 - c) Preserve the evidence related to the infringement.

Fourth: The Commercial Law No. 12 for the year 1966

Should we know that Commercial conducts and/or works are identified to include such that are intended to attain profit through circulation of wealth, and while both of the Franchisor and Franchisee aim at generating profit and expanding their business through the Franchising system, then it becomes obvious that Franchising is considered to be a commercial work, and thus the provisions of the Commercial Law has to be noticed.

In addition to the commercial characteristics of the Franchise Agreement itself, and according to the terms and provisions of the above law, both of the Franchisor and the Franchisee are considered to fall under the category of merchants, and thus – as mandated by the Jordanian legislator- should be registration on the register, kept for this purpose at the Ministry of Industry and trade, in addition they should keep commercial books as specified under Articles (16-19) of the subject law.

Being a merchant, both of the Franchisor and Franchisee shall be subject to the obligations and terms provided under the Commercial Law, among which is being subject to the rules and terms of Bankruptcy.

Moreover, the above legislation has also dealt with and/or regulated the premises where merchants exercises their commercial activities, and has listed the elements of the commercial premise which include customers, the name, the slogan, the right to rent, the distinctive marks, patents, licenses, Industrial designs and models, commercial furniture and goods as material and moral.

Fifth: The Labor Law No. 8 for the year 1996 and its amendments for the year 1999 and 2002

The issue of the applicability of labor legislation to the Franchise relationship has been of a concern, and involves the following aspects:

- > The relationship between the Franchisor and the Franchisee;
- > The relationship (if any) between the Franchisor and the employees of the Franchisee, for example where the Franchisor retains the right to approve the employees of the Franchisee; and
- > The position of the employees of the Franchisee in the Franchise system, which includes questions such as the right of the employees to be consulted on important business decisions.

The Labor Law No. 8 for the year 1996 is the law that governs the relationship between the employer and employee, and thus its terms are applicable upon the above-cited relationships whenever any of it falls under the concept of employment identified by the said law.

One important issue to notice in Franchising Contracts and/or Agreements is related to reaching an invention by an employee and/or worker of the Franchisee during the term of the Franchising Arrangement. The Labor law had solved this issue, whereas it had provided that IPR attained by the employee and/or worker as a result of utilizing the expertise of the employer or his instruments or machines are considered to belong to the employer himself unless there is an agreement to the contrary. On the other hand and where the IPR is reached without using the employer's expertise, information or instruments, such rights shall be considered to belong to the employee and/or worker unless there is a written agreement to the contrary.

Sixth: Taxation Legislation

Taxation regulation is of considerable importance, and it usually decides the corporate form adopted by the parties.

Taxation Issues include the following:

1- The Income Tax Law No. 57 for the year 1985

According to the said law income tax shall be collected in respect of any profit which is accrued and/or earned in the Kingdom from any work, craft, business, profession or vocation regardless of the period during which such a work, business, profession, craft or vocation may have been carried out or exercised and from any separate transaction or deal which is considered as trade or business.

In addition, amounts received in lieu of selling, hiring or concession granted in respect of utilizing a trademark, design, patent or copyright and printing or any other compensation. Whereas the taxable income under this item is distributed over a period of 3 years.

According to the above, the income obtained by the Franchisor and the Franchisee which results from the profits of Franchise arrangement, shall be subject to taxation. Moreover, the Franchise Payments paid to the Franchisor, shall also be subject to taxation.

2- The General Sales Tax Law No. 6 for the year 1994 & The Regulation No. 81 for the year 2000 concerning Registration Threshold For Sales Tax Purposes.

The above legislation had identified the limits and/or ceilings according which a natural and/or corporate person shall be bound to register at the General Sales Tax Department as a tax-payer.

Moreover, the tax payer shall be required to register with the General Sales Tax Department at the dates prescribed below and on the form prepared for this purpose when any of the following cases take place whichever is sooner:

1- At the commencement of a new business related to taxable supplies if it appears to him that his taxable turnover during the next 12 months may exceed the threshold set by virtue of the provisions of this Law.

2- At the end of any month if his taxable turnover during the 12 months then ending has reached the threshold set by virtue of the Law.

3- At the end of any month during which it appears that his taxable turnover during the 12 months ending by the end of the subsequent month may reach the threshold set by virtue of the provisions of this Law.

Both of the Franchisor and the Franchisee shall be obliged to comply with the above terms and provisions, and shall pay a general sales tax of 13% of value the product and/or service's value, on the franchised commodities and/or services.

Seventh: The Investment Promotion Law No. 16 for the year 1995

The Investment Promotion Law deals with economic activities, which enjoy exemptions and facilities. The scope of such sectors and/or sub-sectors was specified therein as follows:

1. Industry
2. The Agriculture sector (without prejudice to other privileges provided under other Laws).
3. Hotels
4. Hospitals
5. Maritime Transport and Railways
6. Any other Sector or Sub-sector the Council of Ministers approve of upon the Council's recommendation.

Among granted exemptions and facilities are the following:

1. Exemptions from fees and taxes (does not include municipal taxes, according to certain terms)
2. Exemption from income and social services tax for a period of 10 years by the rates stipulated therein in accordance with the division of the developmental areas.

Eighth: The Vocational License Law No. 28 for the year 1999

The Vocational License Law provides for a very important platform in the life cycle of the Franchising system, for it stipulates that natural and/or corporate Persons, may not engage in any vocation or trade unless they secure a license for the subject practice thereof and pay the due fees thereon (unless the subject vocation and/or trade was exempted).

Licensed issued in accordance with other laws does not exempt from obtaining the license stipulated under this law.

Ninth: Companies Law No. 22 for the year 1997

The corporate form the Franchisor and the Franchisees adopt is also relevant, in particular for questions of liability and taxation.

It should be realized that the Companies Law has divided the commercial companies into several types:

- 1- General Partnership.
- 2- Limited Partnership.
- 3- Joint Venture.
- 4- Limited Liability Company.
- 5- Limited Partnership in Shares.
- 6- Public Shareholding Company.
- 7- Private Shareholding Company.

The divisions of the companies according to their type is very important for determining the name of the company, the number of partners needed to form each type thereof and the extent of the liability of each partner.

Tenth: The Stamps Duties Law No. 20 for the year 2001

Like any other contracts Franchising Contracts, shall be subject to the Stamps duties which is due on every transaction. The Stamp Duty Fee shall be calculated with a percentage of, 003 of any transaction, in accordance with the special provisions and terms of this law.

Eleventh: Provisional Financial Leasing Law No. 16 for the year 2002

In a Franchising contract, it may be necessary for the Franchisor to lease the Franchisee certain equipment or buildings, which ensures efficient performance of the franchised work. This is particularly the case where specific equipment is needed for the Franchise and where the Franchisor provides that equipment.

According to the Financial Leasing Law, the Financial Leasing Contract is such according to which the Lessee shall be entitled to avail from the Leased Property in return of a lease rate paid to the Lessor, provided that the Lessee bears any risks pertaining to the Leased Property.

The Contract shall be deemed as a Financial Leasing Contract if:

- 1- Includes a provision allowing the transfer of ownership of the Leased Property to the Lessee, in return of an amount equal to the value of the Leased Property specified in the Contract, or
- 3- The period of the Contract is not less than (75%) of the estimated period for availing of the Leased Property, or
- 4- The current value of the total lease rate agreed upon in the Contract is not less than (90%) of the value of the Leased property specified in the Contract, or
- 5- The Contract shall not be subject to the enacted Landlords and Tenants Law.

The Financial Leasing Contract should include full and detailed data on the rented property, the condition thereof, the parties to the contract, its duration and terms. Such information and/or any change introduced it to thereto shall be recorded in the Register kept at the Ministry of Industry and Trade for this purpose.

It is worth mentioning that any person who is not registered in the said register and who does not hold a license from the Ministry of Industry and Trade for this purpose shall be prohibited from conducting financial leasing.

Twelfth: Commercial Agents and Mediators Law No. 28 for the year 2001

There may be certain aspects of the Franchisor and Franchisee's relationship that are covered under the agency and/or distribution framework, regardless of the characterization of the Franchise relationship itself.

The Commercial Agents and Mediators Law Number (28) for the year 2001 regulates agency and distributorships relationships and should therefore be considered, especially where the Franchising takes the type of a "Distribution Franchising" under which the Franchisor is granted a distribution system to market its products, and the Franchisee serves as a distributor and/or outlet for products manufactured by or for the Franchisor.

According to the Commercial Agents and Mediators Law, the Commercial Agent is the person authorized by the principal to act as his agent or representative thereto in the Kingdom, or as a distributor of his products therein, whether as a commission agent or for any other consideration, or whether he works for his own account by selling products imported by him from the principal.

Also, no person may practice the business of commercial agency or commercial mediation in the Kingdom, unless he is recorded, in the commercial agents register or the commercial mediators register.

Thirteenth: The Aqaba Special Economic Zone Law No. 32 for the year 2000

It should be noted that investors in the Aqaba Special Economic Zone "ASEZ" can benefit from the exemptions granted thereto in accordance with the above law

The exemptions and facilities include the following:

- 1- Payment of the income tax at the rate of 5 per cent of the taxable income.
- 2- Payment of a General Sales Tax on the commodities subject to the general sales tax at the rate of 7 per cent.
- 3- No customs duties are charged on the imported commodities. However, to import these commodities free of customs duties, the enterprise should be a company that is registered with the Aqaba Region Authority.
- 4- Easy measures to own real estate in the area.

10- Recommendations:

First: Employment of Franchising as a mean of developing the infrastructure of the local market and expanding business environment for MSEs in the Kingdom, requires the following:

- An evaluation analysis and assessment of the Kingdom's business structure and Franchise experience for MSEs from its economical and social aspects.
- A feasibility study to determine which sectors and/or businesses are interested in a Franchise arrangements, as well as the potential bottlenecks in this system and the most successful ways to function for MSEs.
- Establishment of a separate regulating and/or governing Franchising Department made up of representatives of the small and medium business sector, along with support organizations and the businesses involved in the Franchise networks to service the Franchise industry as a whole, and develop Franchising concepts in the Kingdom, and in specific handle the following:

- 1- Set Franchising concepts and strategies.
- 2- Design and implement long-term training programs and research for introducing local and international business concepts of Franchising.
- 3- Coordinate with local and international related entities.
- 4- Develop and implement Franchising concepts in the Kingdom.
- 5- Lay the necessary infra-structure and organizational resources for Franchising strategy and concepts in Jordan.
- 6- Define the products, services and sectors which can be franchised.
- 7- Analyze Franchising problems in the Kingdom and provide solutions.
- 8- Create a network of national Franchisors and Franchisee, and introduce and match prospective to each other, and offer opportunities of applying the Franchising arrangement.

Second: Design a Policy and Regulatory framework to stimulate development of MSEs, this involves:

- Defining a shared and coordinated national vision regarding MSEs, and projecting a clear statement of their importance in the national economy.
- Introducing incentives and facilities for MSEs with adequate tax incentives, and more support.

Third: It is equally important, and as a part of emphasizing the Franchising system, to alert MSEs to the necessity of more effective use of the IP system as part of their business strategy, as Franchising reflects the reality that domestic economies and world trade depends increasingly on the value of the IPR, which is subject matter of goods and services, and the highest value added component thereof.